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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments,	)	MM Docket No. 00-148
FM Broadcast Stations.	)	RM-9939
(Quanah, Archer City, Converse, Flatonia,	)	RM-10198
Georgetown, Ingram, Keller, Knox City,	)	
Lakeway, Lago Vista, Llano, McQueeney,	)	
Nolanville, San Antonio, Seymour, Waco and	)	
Wellington, Texas, and Ardmore, Durant,	)	
Elk City, Healdton, Lawton and Purcell,	)	
Oklahoma.)	)	

To: Office of the Secretary
Attn: The Commission

APPLICATION FOR REVIEW

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SUMMARY

Rawhide Radio, L.L.C., Capstar TX Limited Partnership, Clear Channel Broadcasting Licenses, Inc., and CCB Texas Licenses, L.P ("Joint Parties") filed a technically acceptable Counterproposal in this proceeding on October 10, 2000, nearly four years ago. The Counterproposal consisted of two alternatives at a time when alternative proposals were permitted, a matter that is undisputed by the Commission staff in its previous orders. Yet although the staff properly dismissed the first alternative as defective, it failed to treat the second alternative properly. Based on numerous prior cases, including one issued less than two weeks ago, the staff should have instituted a new proceeding and issued a notice of proposed rule making setting forth the second alternative when it rejected the first alternative. Instead, the Commission staff dismissed the second alternative and suggested that the Joint Parties re-file their proposal. But a re-filing is not possible, due to Commission staff error in failing to protect the Joint Parties' counterproposal in the engineering data base. As a result of this error the Commission staff accepted and processed a number of conflicting proposals, many of which prohibit a re-filing without special treatment or waiver of the short spacing rules. In addition, although the staff has dismissed some of the conflicting proposals, numerous appeals have caused delays which could continue for several more years. The Joint Parties could not re-file without bringing this problem to the Commission's attention. A draft Petition for Rule Making, updated from the original filing in October 2000, is provided along with this Application for Review.

The Commission must act in accordance with prior case law and issue a notice of proposed rule making on the Joint Parties' alternative proposal. In doing so, it could combine any conflicting proposals into the proceeding as well. It has been nearly four years since the Joint Parties filed a technically acceptable proposal. The Joint Parties urge the Commission to direct the staff to issue a NPRM expeditiously.

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APPLICATION FOR REVIEW

Rawhide Radio, L.L.C., Capstar TX Limited Partnership, Clear Channel Broadcasting Licenses, Inc., and CCB Texas Licenses, L.P.[1] (collectively "Joint Parties"), by their counsel, pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, hereby request review of the *Memorandum Opinion and Order*, DA 04-1080 (rel. April 27, 2004) in the above-captioned proceeding ("*MO&O*"). The *MO&O*, by the Assistant Chief, Audio Division, denied the Joint Parties' Petition for Partial Reconsideration of the *Report and Order*, DA 03-1533 (rel. May 8, 2003). The *Report and Order*, in turn, dismissed the Joint Parties' timely filed counterproposal in this proceeding.

1. This Application for Review meets the standards set forth in Section 1.115 of the Commission's Rules. The Joint Parties are aggrieved by the Commission's action dismissing their counterproposal and denying reconsideration of that action, and they participated fully in

[1] CCB Texas Licenses, L.P., a subsidiary of Clear Channel Communications, Inc., is added as a party to this proceeding because it is the new licensee of KAJA, San Antonio and KHFI-FM, Georgetown, Texas.

the proceeding below. *See* 47 C.F.R. § 1.115(a). The following question is presented for the Commission's review: did the MO&O err in dismissing the Joint Parties' alternative proposal instead of issuing a new notice of proposed rule making? *See* 47 C.F.R. § 1.115(b)(1). Review is appropriate under Section 1.115(b)(2)(i) because the dismissal of the counterproposal conflicts with established case law and policy, and under Section 1.115(b)(2)(iv) because the staff relied on an erroneous finding as to a material question of fact. This Application for Review is timely filed within 30 days of public notice of the *MO&O*.[2]

2. The Joint Parties' counterproposal involved twenty-two communities in Texas and Oklahoma, an admittedly ambitious undertaking that would have substantially advanced the Commission's allotment priorities. However, it turned out not to be grantable. In the *Report and Order* the staff concluded that the counterproposal, taken as a whole, could not be granted because the change proposed at one of the communities, Archer City, Texas, was in conflict with a prior-filed application for Station KICM, Krum, Texas. The Joint Parties do not contest that finding.

3. In their counterproposal, the Joint Parties presented the Commission with an alternative proposal in case the counterproposal as a whole could not be granted. This alternative proposal was deliberately inconsistent with the counterproposal, but otherwise technically acceptable, so that if the counterproposal as a whole could not be processed the separate proposal could then be considered.[3] Presentation of alternative proposals in this manner comported with the law at that time, as will be discussed. The staff found that this alternative did not conflict

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[2] *See* 69 Fed. Reg. 29242 (May 21, 2004).

[3] The alternative proposal was referred to in the Joint Parties' counterproposal as the "KVCQ Alternative." Station KVCQ, McQueeney, Texas has since changed its call sign to KNGT. As set forth in the counterproposal, this alternative would involve changes at Converse, Flatonia, Georgetown, Ingram, Lakeway, Lago Vista, Llano, McQueeney, Nolanville, San Antonio, and Waco, Texas. *See* Counterproposal at 44-45. A form of the petition for rule making setting forth these allotments is attached hereto.

with the proposal set forth in the *Notice of Proposed Rule Making*, and then, for that reason, *dismissed the alternative proposal.* The Joint Parties vigorously contest this action, which they believe was clearly erroneous and grossly unfair. In keeping with its processing rules and applicable precedent, and in furtherance of the public interest, the staff should have issued a new notice of proposed rule making setting forth the changes involved in the alternative proposal and soliciting public comment.

4. The Joint Parties filed a petition for reconsideration of the staff's dismissal of the alternative proposal. As discussed in the petition for reconsideration, the alternative proposal was a self-contained proposal for rule making, complete and properly presented, and not facially defective. If it had been presented standing alone rather than as an alternative to a larger counterproposal, there is no question that it would have been placed in a notice of proposed rule making as a routine matter. To dismiss the same proposal merely because of its context is unfair and contrary to orderly administrative procedure. Moreover, the Joint Parties pointed out that in many prior cases the Commission had placed non-conflicting proposals advanced in comments in new notices of proposed rule making. Indeed, the Commission continues to do so, most recently in *Milford, Utah*, DA 04-1651 (rel. June 10, 2004). Finally, the Joint Parties pointed out that dismissing the alternative proposal was particularly unfair and prejudicial in this case because of a series of Commission errors. During the pendency of this proceeding, the Commission had accepted a number of petitions for rule making that conflicted with the Joint Parties' proposals, in violation of its own rules, without affording the Joint Parties' proposals protection as the rules required. The Commission continued to accept such conflicting filings even after the Joint Parties notified the Commission of the errors. Now, those proceedings

currently prevent the Joint Parties from filing the alternative proposal as a new petition. Yet the staff based its decision on the erroneous expectation that the Joint Parties could re-file.

5. The *MO&O* attempts to address the foregoing arguments raised by the Joint Parties on reconsideration. However, as discussed below, its reasoning fails to justify the Commission's original erroneous dismissal of the alternative proposal. Moreover, the *MO&O* further errs when it suggests that the Joint Parties will have another opportunity to re-file at a future time. Such an opportunity is illusory, and proceeding in this way would almost certainly be doomed to failure.

6. As background to the discussion, it is important to recognize that the Joint Parties' alternative proposal offers substantial public interest benefits, as measured by its advancement of the Commission's FM allotment priorities. The proposal would provide first local services at three communities: Converse, Texas (pop. 11,508), Lakeway, Texas (pop. 8,002), and Lago Vista, Texas (pop. 4,507). It would also provide an overall gain in FM radio service to a population of more than one million people. If the reasoning of the *MO&O* is upheld, these potential public interest benefits would likely disappear forever.

I. The Alternative Proposal was Clearly Identified and Set Forth as an Independent Proposal and Did Not Require the Staff to Bifurcate the Counterproposal, as the *Report and Order* Initially and Correctly Held.

7. First, the *MO&O* attempts to disclaim any obligation at all for processing the alternative proposal. The *MO&O* states that "it was not incumbent on the staff to determine which portion of the Counterproposal could be considered in a separate *Notice of Proposed Rule Making* or, on its own motion, bifurcate the Counterproposal." *MO&O* at ¶ 11. This statement does not accurately reflect the situation the staff was presented with, and contradicts the earlier *Report and Order*. The staff did not have to determine which portion of the counterproposal to consider, since the Joint Parties clearly set forth the alternative proposal in their comments. *See*

Counterproposal at ¶¶ 66-67. The Joint Parties listed the individual components of the alternative proposal and referred to the sections of the text and the engineering statement in which these components were described. The Joint Parties stated that this alternative could "be granted on its own merits." *Id.* at ¶ 67.The staff did not need to bifurcate the Joint Parties' counterproposal, since the Joint Parties bifurcated it themselves. Indeed, in the *Report and Order*, the staff considered both alternatives, and discussed each one as a separate and distinct set of interrelated proposals. *See Report and Order* at ¶ 7.

8. The staff *did* have an obligation to consider a technically acceptable proposal according to its processing rules, and this it failed to do. The alternative proposal could have been considered separately, and the staff should have, consistent with past case law, issued a notice of proposed rule making either in this docket or in a new docketed proceeding.[4] The *MO&O* correctly noted that at the time the Joint Parties filed their counterproposal, it was common and accepted practice to present alternatives to the Commission in case a primary proposal could not be granted. The Commission announced its policy to discontinue acceptance of such alternative proposals, *on a prospective basis*, in 2001 – well after the Joint Parties' counterproposal had been filed. *See Winslow, Camp Verde, Mayer and Sun City West, Arizona*, 16 FCC Rcd 9551 (2001). The *MO&O* does not contest the inapplicability of the *Winslow* principle to this proceeding, nor that the filing of an alternative proposal was consistent with the law in effect at the time the counterproposal was filed.

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[4] Indeed, as the Joint Parties argued in their petition for reconsideration, dismissing the alternative proposal without any consideration may be a violation of administrative law. The FCC is required to give an interested person the right to petition for the issuance of a rule. 5 U.S.C. § 553(e). If such a petition is denied, the agency must give prompt notice of its denial, and the reasons therefor. 5 U.S.C. § 555(e). It is not within the FCC's power to reject a petition for rule making outright, as it did in this case, unless it is patently defective. *National Org. for the Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974); *See Municipal Light Boards v. FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) (rejection of a filing is appropriate if "the filing is so deficient on its face that the agency may properly return it to the filing party without even awaiting a responsive filing by any other party in interest").

II. The Staff's Analysis of Applicable Precedent Confirms that the Commission Treated the Joint Parties' Alternative Proposal Disparately when it Dismissed the Proposal Instead of Issuing a New Notice.

9. In *Milford, Utah*, DA 04-1651 (rel. June 10, 2004), released only 11 days ago, the staff was faced with exactly the same situation as in this proceeding. A counterproposal for Enterprise, Utah had been filed in that proceeding, and two separate petitions for Pahrump, Nevada were linked to the proceeding because they were in conflict with one aspect of the Enterprise counterproposal, although they were not in conflict with the notice of proposed rule making. The counterproposal was found to be defective, and was dismissed. The two separate petitions, which no longer conflicted with any aspect of the proceeding, were placed in a separate proceeding by the issuance of a new notice of proposed rule making the same day. *See Lake Havasu City, Arizona, and Pahrump, Nevada*, DA 04-165 (rel. June 10, 2004). Similarly, in this case, the Joint Parties' alternative proposal was in conflict with the defective counterproposal, but not in conflict with the notice of proposed rule making for Quanah, Texas. The alternative proposal was and is a technically acceptable proposal, which should have been placed in a new notice of proposed rule making once the conflicting counterproposal was dismissed.

10. In their petition for reconsideration, the Joint Parties referred to a number of other cases in which the Commission, when confronted with a technically acceptable non-conflicting proposal advanced in comments, issued a new notice of the proposal.[5] The *MO&O* attempts to distinguish the cases cited by the Joint Parties in which the Commission followed just this procedure. However, its discussion of the cases is unenlightening, since the staff advances no

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[5] *See Noblesville, Indianapolis and Fishers, Indiana*, 18 FCC Rcd 11039 (2003); *Saratoga, Green River, Big Piney and La Barge, Wyoming*, 15 FCC Rcd 10358 (1996); *Alva, Bartlesville and Ponca City, Oklahoma and Deerfield, Missouri*, 11 FCC Rcd 20915 (1996); *Oakdale and Campti, Louisiana*, 7 FCC Rcd 1033 (1992); *Kingston, Tennessee*, 2 FCC Rcd 3589 (1987).

difference that justifies disparate treatment in this case and offers no case in which it has *ever* treated another proposal in the manner it treated this one.[6]

11. In *Noblesville, Indianapolis and Fishers, Indiana*, 18 FCC Rcd 11039 (2003), the Commission did not accept a counterproposal because it was not in conflict with the original proposal in the proceeding, and a modification to that proposal (which would have created the conflict) was disallowed for procedural reasons. True, that is a different factual situation than this case. However, the Commission did not dismiss the non-conflicting counterproposal, nor did it require the filing of a new petition. It simply issued a new notice of proposed rule making.[7] The same result should apply here. A technically acceptable non-conflicting proposal remains after other proposals were dismissed or denied in this proceeding. The Commission should not dismiss the remaining alternative proposal. It should issue a new notice of proposed rule making regarding this alternative proposal.

12. *Saratoga, Green River, Big Piney and La Barge, Wyoming*, 15 FCC Rcd 10358 (1996), involved two proceedings. In the first proceeding (MM Docket 98-130), a counterproposal was filed proposing Channel 259C1 at Green River, Wyoming. This counterproposal was in conflict with a proposal in the other proceeding (MM Docket 99-56), proposing Channel 259C at Big Piney, Wyoming, thus leading the Commission to combine the proceedings. However, the Big Piney proposal was filed too late to be included as a counterproposal in MM Docket 98-130, so it was properly dismissed. Before its dismissal, though, the Commission had already received a counterproposal in MM Docket 99-56 proposing

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[6] The *MO&O* states that "the counterproposals in those proceedings involved proposals in technical compliance with our rules." *MO&O* at ¶ 12. However, this is not a distinction for two reasons: first, the alternative proposal in this proceeding *is* in technical compliance with the rules, and second, at least one of those cases involved a defective counterproposal and a technically acceptable alternative, just as this case does. *See Kingston, Tennessee*, 2 FCC Rcd 3589 (1987). *See also Milford, Utah, supra*, decided after the *MO&O*.

[7] *See Seymour and Sellersburg, Indiana*, 18 FCC Rcd 11047 (2003).

channels at Big Piney and La Barge, Wyoming. Once the original Big Piney proposal was dismissed, this counterproposal was no longer in conflict with any proposal before the Commission, but this lack of conflict did not result in its dismissal. Instead, the Commission issued a new notice of proposed rule making. Similarly, in this case, the alternative proposal was properly before the Commission by virtue of its inclusion as a mutually exclusive alternative to the Joint Parties' counterproposal. Once the counterproposal was dismissed because of the defect at Archer City, the alternative proposal was no longer in conflict with any proposal before the Commission. Just as in *Saratoga*, the Commission should have issued a new notice of proposed rule making, and should not have simply dismissed the non-conflicting proposal.

13. In *Alva, Bartlesville and Ponca City, Oklahoma and Deerfield, Missouri*, 11 FCC Rcd 20915 (1996), the proposal for a channel at Deerfield, Missouri had been filed as a counterproposal in MM Docket 95-179.[8] When the Commission found that the Deerfield proposal did not conflict with any of the proposals in that proceeding, it did not dismiss the proposal; rather, it issued a new notice of proposed rule making.

14. In *Oakdale and Campti, Louisiana*, 7 FCC Rcd 1033 (1992), the petition for Oakdale, Louisiana had originally been filed as a counterproposal in MM Docket 89-447. *See Coushatta, Louisiana*, 5 FCC Rcd 5418 (1990). Although it did conflict with a channel at issue in the proceeding, the conflicting proposal was dismissed for lack of an expression of interest. Therefore, the Oakdale proposal was no longer in conflict with any proposal in the proceeding. The Commission did not dismiss the proposal. It issued a new notice of proposed rule making setting forth the Oakdale proposal.

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[8] *See Cassville and Kimberling City, Missouri*, 11 FCC Rcd 4682 (1996).

15. In *Kingston, Tennessee*, 2 FCC Rcd 3589 (1987), the original petitioner withdrew his proposal for Kingston, Tennessee. A counterproposal for Somerset, Kentucky was found to be defective, but an *alternative proposal* advanced by the Somerset counterproponent was found to be acceptable, except that it did not conflict with any of the proposals in the proceeding. Again, the Commission issued a new notice of proposed rule making setting forth the alternative proposal for Somerset. It did not dismiss the proposal. The present case bears a strong resemblance to the *Kingston, Tennessee* proceeding. Just as in that case, a counterproposal was found to be technically defective. Just as in that case, the counterproponent advanced an alternative proposal that did not conflict with the petition. Just as in that case, the Commission should issue a new notice of proposed rule making of the Joint Parties' alternative proposal.

16. It is not clear what the staff considers to be the factors distinguishing the present case from the cases discussed above. The staff cited no case in which a similar proposal was dismissed and required to be re-filed. Every one of the cases cited involved a counterproposal that was for one reason or another found not to be in conflict with the proceeding in which it was being processed. Every case resulted in the issuance of a new notice of proposed rule making setting forth the non-conflicting counterproposal. In this case, just like the others, the staff considered the alternative proposal in the context of this proceeding, and found it not to be in conflict. *See Report and Order* at ¶ 7. Under established precedent, it should have issued a notice of proposed rule making.

III. It is Unfair and Troubling that the Commission Would Require the Joint Parties to Re-File their Proposal at Some Time in the Future, and in Any Event it is Unlikely that Such a Re-Filing Would Be Possible.

17. Finally, the *MO&O* argues that there is no unfairness in requiring the Joint Parties to re-file the alternative proposal as a new petition for rule making. *MO&O* at ¶ 13. The *MO&O* states that the FCC has dismissed the petitions that were erroneously accepted, and suggests that

the Joint Parties should re-file after those dismissals (which are currently subject to appeal before the Commission) become final. But in fact, this procedure would be grossly unfair, particularly because it has been nearly four years since the proposal was submitted. The Joint Parties were the first to file an acceptable rule making proposal. Obviously, it is the latecomers who should wait for the Joint Parties' proposal to be processed, not the other way around. Moreover, the roadblocks that stand in the way of a re-filing by the Joint Parties are of the Commission's own making, and no fault of the Joint Parties. Indeed, the Joint Parties pointed out the Commission's errors on numerous occasions, but were ignored. The staff's suggested procedure would only compound the inequities that the Joint Parties have suffered because of the Commission's failure to follow its own rules.

18. Moreover, the Commission continues to throw roadblocks in the way of a re-filing, making it highly unlikely that the Joint Parties could ever get the process restarted again. The Commission has granted an application for Station KLMO-FM, Dilley, Texas (File No. BPH-20010102AAO) that was short-spaced to one of the Joint Parties' proposals, which could by itself render a re-filing defective. Moreover, the Commission's recent freeze on rule making petitions which are in conflict with allotments in Auction 37 would preclude a re-filing of the alternative proposal.[9] Finally, there are still several conflicting petitions that have not been dismissed yet and would take cut-off priority over a re-filing by the Joint Parties.

[9] *See Public Notice, Auction 37 Freezes Announced for FM Minor Change Applications and Certain Rulemaking Filings*, DA 04-1642 (rel. June 7, 2004). This action immediately suspended acceptance of rule making proposals involving a change to any of the vacant allotments involved in the upcoming auction. Among those allotments to be auctioned is Channel 243A at Ingram, Texas. The Joint Parties proposed to modify this allotment to substitute equivalent Channel 256A.

A. The Commission Erred Repeatedly in Accepting Conflicting Petitions, Contrary to its Processing Rules.

19. First, the Commission allowed the Joint Parties' counterproposal to languish for two and a half years before it took its initial action – a delay that is particularly inexcusable given that the action consisted simply of a summary dismissal.[10] Now, the Commission asks the Joint Parties to wait even longer while it handles proceedings that never should have been begun in the first place.

20. On April 27, 2001, the Commission erroneously released a notice of proposed rule making soliciting comment on a proposal to allot channel 232A at Shiner, Texas in MM Docket No. 01-105. This was error because Channel 232A conflicted with the Joint Parties' proposal to allot Channel 232A at Flatonia, Texas in this proceeding, but was filed after the comment date in this proceeding. On June 18, 2001, the Joint Parties filed comments in Docket 01-105 pointing out the Commission's error, and suggesting that the error may have occurred because the Joint Parties' counterproposal had not been entered in the Commission's engineering data base when the Shiner proposal was filed. Although the Shiner allotment was ultimately denied for the reasons offered by the Joint Parties, that proceeding is currently the subject of an application for review before the Commission.

21. On June 23, 2001, the Commission compounded its error by releasing *three more* erroneous notices of proposed rule making, in MM Docket 01-131 (Benjamin, Texas), 01-133 (Mason, Texas), and 01-130 (Batesville, Texas). *See* 16 FCC Rcd 12680 (2001). Again, these proposals were in conflict with the Joint Parties' counterproposal but filed too late for inclusion

[10] In a footnote, the staff attempts to blame the Joint Parties themselves for the egregious processing delay, implying that if the Joint Parties had not filed such a complex proposal the staff would have acted more expeditiously. *MO&O* at ¶ 13 n.16. This argument might possibly carry some weight if the staff action had actually required analysis of the complex proposal. Since all the staff did was dismiss it because of a defect that other parties brought to the Commission's attention, the delay can hardly be laid at the Joint Parties' feet.

in this proceeding. The Commission took these actions despite having been alerted by the Joint Parties earlier that same week to the problem with the engineering data base. Yet, the Commission's staff still failed to place the Joint Parties' proposal in its data base. On August 13, 2001, the Joint Parties filed comments in the Benjamin and Mason proceedings pointing out the errors.[11] Although the Benjamin and Mason allotments were denied for the reasons offered by the Joint Parties, those proceedings are currently the subject of review before the U.S. Court of Appeals for the District of Columbia Circuit. The Batesville proceeding is still pending.

22. On July 13, 2001, the Commission issued *two more* erroneous notices of proposed rule making in MM Docket 01-153 (Tilden, Texas), and 01-154 (Goldthwaite, Texas). These proposals, too, conflicted with the Joint Parties' counterproposal but were too late for inclusion. The Joint Parties had informed the Commission nearly one month beforehand that it had made other errors of this nature, but the Commission continued to dig itself a deeper hole despite this warning. On August 17, 2001, the Joint Parties pointed out the errors in comments in both proceedings. The Tilden and Goldthwaite proceedings are currently the subject of an application for review before the Commission.

23. On August 10, 2001, the Commission issued *yet another* erroneous notice of proposed rule making, in MM Docket 01-188 (Evant, Texas). The Commission had by that point received *three separate warnings* from the Joint Parties – in Shiner, Texas, Benjamin, Texas, and Mason, Texas, that it was accepting conflicting proposals too late for inclusion in this proceeding, but these warnings went unheeded. The Commission actually granted the Evant

[11] The conflict between Channel 275C2 at Benjamin was only with the portion of the Joint Parties' counterproposal that the Commission found to be defective because of the Archer City/Krum conflict. Accordingly, the Joint Parties no longer oppose the Benjamin allotment.

allotment, but subsequently rescinded that grant. *See Order*, 18 FCC Rcd 6213 (2003) The Evant proceeding is currently the subject of an application for review before the Commission.

24. The Commission claims that it has dismissed all the conflicting filings, but it has not. The Batesville proceeding, discussed above, which the Joint Parties identified in their petition for reconsideration, is still pending. The Joint Parties are aware of at least four more conflicting rule making proceedings pending at the Commission. On October 21, 2002, a counterproposal was filed in MB Docket 02-248 (Smiley, Texas) proposing to allot Channel 232A at Victoria, Texas, in conflict with the Joint Parties' proposal for Channel 232A at Flatonia, Texas. The Victoria proposal remains on file, and has not been dismissed. On May 21, 2003, a petition for rule making was filed to allot Channel 247A at Garwood, Texas in conflict with the Joint Parties' proposal for Channel 247C1 at Lakeway, Texas. The Garwood proposal remains on file, and has not been dismissed. On July 18, 2003, a petition for rule making was filed to allot Channel 245C3 at Christine, Texas in conflict with the Joint Parties' proposal for Channel 245C1 at San Antonio. The Christine proposal remains on file, and has not been dismissed. On December 2, 2003, a petition for rule making was filed to allot Channel 243A at Goldthwaite, Texas in conflict with the Joint Parties' proposal for Channel 243C2 at Lago Vista, Texas. The Goldthwaite proposal remains on file, and has not been dismissed.

B. The Staff Erred in Suggesting that the Joint Parties can Re-File their Alternative Proposal as a Petition for Rule Making at a Later Date.

25. The *MO&O* suggests that the Joint Parties can simply re-file their proposal after the Commission's dismissals of other conflicting petitions are final. *See MO&O* at ¶ 13. But this is no remedy at all. First, filing the alternative proposal as a new petition is prevented by the freeze on rule making proceedings that affect the November, 2004 FM auction. *See* Public Notice, *Auction 37 Freezes Announced for FM Minor Change Applications and Certain*

Rulemaking Filings, DA 04-1642 (rel. June 7, 2004). This freeze was imposed after the issuance of the *MO&O*. Since the Joint Parties' alternative proposal requires a channel substitution at Ingram, Texas, one of the construction permits set for auction, it cannot be filed until after the auction. If one of the Ingram applicants specifies a transmitter site that conflicts with the Joint Parties' proposal, the proposal could be forever barred.

26. Second, because of the pending appeals discussed above (and others that will surely be filed if those are dismissed), it is clear the Joint Parties *do not* have an adequate remedy if their alternative proposal is dismissed in this proceeding.

27. As discussed above, the Commission's dismissal of the rule making proposal for Mason, Texas is currently pending before the U.S. Court of Appeals. The Commission's dismissals of the Shiner, Tilden, and Goldthwaite proposals are currently before the Commission on applications for review, and may be subject to review by the U.S. Court of Appeals if the dismissal is upheld. During the pendency of these appeals, the Commission almost certainly will, in the ordinary course of its business, issue one or more notices of proposed rule making setting forth a proposal that conflicts with some aspect of the Joint Parties' alternative proposal. It could be one of the pending proposals for Garwood, Christine, or Goldthwaite discussed above, or another similar conflicting allotment. Any counterproposal the Joint Parties may file in such a proceeding would be contingent upon the finality of other proceedings still subject to appeal. *See Auburn, Alabama, et al.*, 18 FCC Rcd 10333, 10340-41 (2003). Thus, the Joint Parties' proposal may be forever barred for this reason as well.

28. It was through the Commission's errors – repeated and compounded despite the Joint Parties' opposition filings – that these conflicting proceedings were allowed to go forward, precluding the Joint Parties from now re-filing their once-acceptable alternative proposal as a

new petition for rule making. There is a simple solution to all of these problems, and that is to issue a notice of proposed rule making setting forth the Joint Parties' alternative proposal for public comment. In this manner, any conflicting proposals can be treated as mutually exclusive petitions according to well-established processing rules. The Commission can deal with all of the proposals on their merits and avoid needless applications for review and appellate challenges.

IV. The Joint Parties' Proposal is Set Forth in a Form Petition for Rule Making Attached Hereto.

29. For the staff's convenience, a draft petition for rule making is attached as an exhibit to this application for review. The petition for rule making sets forth the Joint Parties' alternative proposal in a form that will enable the staff to rapidly and efficiently process the proposal. It has been updated to reflect the changes since its original filing in October, 2000. The communities and allotments requested are exactly the same as those requested in the Joint Parties' October 10, 2000 counterproposal in this proceeding. Indeed, as discussed at length herein, this proposal was properly presented to the Commission as a timely and acceptable but non-conflicting proposal on October 10, 2000. It should be given priority over any subsequently filed mutually exclusive proposals that have been dismissed, and combined into a single proceeding with any remaining pending proposals, or future timely filed proposals, with which it conflicts.[12]

30. The staff is apparently under the misconception that a petition for rule making setting forth the proposals in the Joint Parties' alternative proposal cannot be accepted until the Commission's dismissal of a number of conflicting proposals is final. *See MO&O* at ¶ 13. This is not true. A petition for rule making is not unacceptably contingent if it is contingent only on

[12] The proceeding for Batesville, Texas, MM Docket No. 01-130, 16 FCC Rcd 12680 (2001), which should not have resulted in the issuance of a notice of proposed rule making, may be combined with the new proceeding as well.

other changes to the Table of Allotments that have been granted but are not yet final. *Auburn, Alabama, et al.*, 18 FCC Rcd 10333, 10340-41 (2003). Accordingly, as set forth in the draft petition for rule making, such a petition is acceptable immediately.

V. Conclusion.

The staff erred in dismissing the Joint Parties' alternative proposal. The staff's action was inconsistent with precedent (including a case decided less than two weeks ago), and relied on erroneous facts regarding the Joint Parties' ability to re-file the alternative proposal. Accordingly, the Commission should direct the staff to issue a new notice of proposed rule making soliciting comment on Joint Parties' alternative proposal. Doing so will (1) further the public interest in the rapid introduction of improved service; (2) comport with orderly administrative procedure and the Commission's case law and policy; and (3) avoid significant procedural problems introduced by the Commission's own erroneous actions following the filing of the Joint Parties' original proposal. On the other hand, dismissing the Joint Parties' alternative proposal, as the staff did in the proceeding below, is contrary to law and extraordinarily unfair to the Joint Parties. The alternative that the staff proposed – re-filing the proposal as a new petition after certain intervening proceedings are settled – will, as the staff surely knows, likely prevent the proposal from ever being entertained. The Joint Parties' alternative proposal should be treated in the same way as the Commission has previously treated similar proposals. In the absence of a patent defect in the alternative proposal the staff cannot refuse to consider their proposal because of its complexity or for any other reason.

WHEREFORE, for the foregoing reasons, the Commission should issue a new notice of proposed rule making soliciting comment on Joint Parties' alternative proposal as originally filed on October 10, 2000.

Respectfully submitted,

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